APPEAL NO. 040987
FILED JUNE 21, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 1, 2004. With regard to the only issue before her, the hearing officer determined that the respondent (claimant) was entitled to change treating doctors to Dr. JB, pursuant to Section 408.022.

The appellant (carrier) appealed, contending that the hearing officer erred in applying an abuse-of-discretion standard, erred in determining that "YM" was not the claimant's treating doctor, erred in finding that Dr. T did not treat the claimant for more than 60 days, and erred in determining that the carrier waived its right to dispute the approval of the change of treating doctor. The claimant responded, urging affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant, a cook, sustained a compensable injury on _____, when she fell from a chair on wheels onto her left side. The claimant had a prior left hip replacement and other unrelated medical problems. The claimant sought medical treatment at (hospital) on January 9, 2003, where she was seen by YM. Although there was conflicting testimony, the hearing officer commented that the claimant was unhappy with YM and asked the employer to send her to another doctor for a second opinion. The hearing officer found that the employer made an appointment for the claimant with Dr. T and that the claimant saw Dr. T more than once, but that Dr. T "treated [claimant] for less than sixty days." The claimant subsequently was approved to change treating doctors from Dr. T to Dr. JB.

The carrier contends that the hearing officer erred in applying an abuse-of-discretion standard by finding that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion when it approved the Employee's Request to Change Treating Doctors (TWCC-53) allowing the change to Dr. JB. The Appeals Panel addressed the standard to be used in reviewing a change of treating doctor in Texas Workers' Compensation Commission Appeal No. 020022, decided February 14, 2002, and Texas Workers' Compensation Commission Appeal No. 022245, decided October 22, 2002. In Appeal No. 020022, *supra*, the Appeals Panel stated that while the Commission has previously considered changes of treating doctor in language encompassing "abuse of discretion," Advisory 2001-01, dated January 15, 2001, reflected a concern of the Commission that inconsistency was to be avoided in approving such changes and that the issue was "expressly broader than merely an abuse of discretion in approval of the [TWCC-53]." In Appeal No. 022245, *supra*, the issue was framed, as it was in this case, as whether the claimant was "entitled to change treating doctors." The Appeals Panel cited Appeal No. 020022 and held that

the issue is "broader than whether a particular Commission employee who approved the change abused his or her discretion." The hearing officer was to evaluate whether a change should be allowed in accordance with the standards set forth in Section 408.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9) and the hearing officer is not limited to considering a change of treating doctor issue only in terms of whether the Commission abused its discretion. Texas Workers' Compensation Commission Appeal No. 020414, decided April 3, 2002. Our review of the record indicates that, while the hearing officer mentioned abuse of discretion, she properly applied Section 408.022 and Rule 126.9.

Although the hearing officer commented that the claimant "treated with an emergency room doctor [YM], M.D., affiliated with [hospital]" and the parties and hearing officer referred to Dr. YM, as the claimant's response points out, it is unclear whether YM is even a doctor. The hospital outpatient notes have YM's name in the box labeled "Physician," and YM's signature at the bottom has initials after the name, which are hard to distinguish. One progress note has YM's name followed by "PA-C." More telling are the hospital radiology reports (Claimant's Exhibit No. 6) which clearly lists "Ordering Physician: [YM] PA-C." and lists medical doctors as attending and admitting physicians. (One radiology report dated March 10, 2003, does show both the ordering and attending physician to be "[YM] PA-C.") It would appear fairly clear that YM is not a doctor pursuant to Section 408.022 and/or that pursuant to Rule 126.9(c)(3) was not a "doctor" providing emergency care. Although the claimant saw YM several times, the comment that YM "was not [the] initial, treating doctor" is supported by the evidence. We do reverse the finding of fact that YM was an emergency room doctor and an M.D. as being unsupported by the evidence.

Although there was conflicting evidence, the hearing officer found that the claimant was sent to Dr. T "at the behest of the Employer for the purpose of providing a second opinion." The medical records indicate that the claimant first saw Dr. T on April 17, 2003, on referral from the employer. Other records show that the claimant was seen by Dr. T on May 7 and May 28, 2003. Dr. T completed a Report of Medical Evaluation (TWCC-69) certifying the claimant at maximum medical improvement on May 28, 2003, and there is no indication that the claimant saw Dr. T after that date. Pursuant to Rule 126.9(c)(2), the initial choice of the treating doctor excludes "a doctor recommended by the . . . employer, unless the injured employee continues. . . to receive treatment from the doctor for a period of more than 60 days[.]" The hearing officer did not err in determining that Dr. T treated the claimant for less than 60 days.

Whether or not the hearing officer erred in determining that the carrier waived its right to dispute the approval of the change of treating doctor is immaterial in that it appears that Dr. JB was the claimant's initial treating doctor because neither YM nor Dr. T were initial treating physicians.

The hearing officer's determinations on the disputed issues are supported by sufficient evidence, are not erroneous as a matter of law, and are not so against the

great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We reverse the finding regarding YM's status as an emergency room M.D. by deleting the words "M.D., a doctor who" in the hearing officer's Finding of Fact No. 4; otherwise, the hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **GULF INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

CONCUR IN THE RESULT:

_____
Gary L. Kilgore
Appeals Judge